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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

On Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF NEWPORT NEWS DAILY PRESS & TIMES HERALD RICHMOND TIMES-DISPATCH AND NEWS LEADER USA TODAY THE WASHINGTON POST IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici adopt the question presented in the Brief for the United States.

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PRELIMINARY STATEMENT

The Newport News Daily Press and The Times-Herald, the Richmond Times-Dispatch and the Richmond News Leader, USA TODAY, and The Washington Post submit this brief *amici curiae* in support of Respondents Kokinda and Pearl. All parties to this suit have given *amici* written consent to the filing of

this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

All amici are publishers of newspapers that circulate in the Fourth Circuit and elsewhere. Each publisher wishes to emphasize the importance of upholding the Fourth Circuit decision in this case, especially as it may apply to newspaper distribution.

The Daily Press and The Times-Herald of Newport News, Virginia are Tribune Company newspapers, as are the Chicago Tribune and New York Daily News. The nation's fourth largest newspaper publisher, Tribune Company is committed to the principles of free speech and a free press.

Richmond Newspapers, Inc., publishes morning and evening newspapers, the Richmond Times-Dispatch and The Richmond News Leader, which are distributed in 21 cities and 71 counties throughout the Commonwealth of Virginia.

USA TODAY, published by Gannett Satellite Information Network, Inc., is a national daily newspaper, published five days a week and distributed in all 50 states, with a daily circulation exceeding 1.4 million.

The Washington Post Company publishes The Washington Post, a daily newspaper circulated in Washington, D.C., Maryland and Virginia, with a daily circulation of 773,000 and a Sunday circulation of 1,126,000.

CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amici adopt the constitutional provisions involved and the statement of the case, all as set forth in the Respondents' Reply to the Brief for the United States.

SUMMARY OF ARGUMENT

Post office facilities in countless communities have a deeply ingrained history of serving the public as a meeting place, a place for gathering and disseminating information, a place that the Post Service itself is trying to convert to purposes vastly more diverse than the mere handling of mail. Against this history and steady constitutional recognition of the right to use public sidewalks and similar public places to communicate with others, the U.S. Postal Service began eleven years ago to attempt to cancel the public's use of postal grounds for the dissemination of information or discussion. In particular, many post offices are long time and natural centers for the distribution of newspapers, a First Amendment activity that has complied with many reasonable regulatory requirements. The Fourth Circuit Court of Appeals correctly held that the grounds of post offices are public fora, that the Postal Service ban on solicitation, political campaigning and commercial vending of information was not an appropriate and constitutional remedy, and that the government's interest could be addressed in more narrowly written rules. The Fourth Circuit should be affirmed.

ARGUMENT

I. THESE POSTAL SERVICE REGULATIONS UNCONSTITUTIONALLY BAN PROTECTED SPEECH IN A PUBLIC FORUM

This case reviews the decision by the Fourth Circuit Court of Appeals, which reversed Respondents' conviction for soliciting contributions on a sidewalk in front of a post office in violation of United States Postal Service Regulation 39 C.F.R. § 232(h)(1) (1988). *United States v. Kokinda*, 866 F.2d 699 (4th Cir. 1989). 39 C.F.R. § 232(h)(1) provides in relevant part:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

The majority opinion below concluded that public sidewalks are a traditional public forum (*Kokinda*, 866 F.2d at 701-02); that post office sidewalks are not practically or legally distinguishable from other government owned sidewalks (*id.* at 702-03); that the absolute ban on protected speech promulgated in the Postal Service regulation went well beyond permissible time, place and manner restrictions (*id.* at 703-04); and that there was no evidence of a significant governmental interest best served by the regulation (*id.* at 704-06). *Amici* believe the Fourth Circuit majority was correct in its analysis and result and should be affirmed.

Specifically, *amici* urge that even a brief examination of the historical function of post offices and their long tradition as a public forum verify the

Fourth Circuit's conclusion that public forum analysis of the regulation should be applied. Furthermore, there is no persuasive analysis in prior case authorities to justify ignoring the historical and practical public use of post offices. Finally, there is no need to reject the obvious nature of post office grounds to accomplish the Postal Service's apparent purpose in its regulations.

In its effort to uphold these regulations, the United States makes three fundamental errors. First, it repeatedly makes the historically incorrect assertion that post offices are not and have not been public fora and centers for communicative activity. *See, e.g.*, Brief of United States at 12, 13, 14, 16-32 (cited hereinafter as "U.S. Br. at ___ "). Second, it argues at length that this Court must find post office property to be a non-public forum in order for it to regulate disruptive activity. Third, it supposes there is no simple, straightforward means of dealing with disruptive activity without undertaking a broad gauge prohibition of First Amendment activity.

There is, however, much more behind the Postal Service's argument that bears the seeds of great mischief. If post office grounds, which, as shown below, have a long tradition of being open and public meeting places, can be removed from public forum status by the single step of adopting administrative regulations of speech and related conduct, huge portions of all appropriately open government facilities can be closed to speech. Furthermore, if post office grounds are declared by this Court to be nonpublic fora, not only aggressive, personal solicitation, but all forms of speech and distribution of news or information would be at the mercy of the government's whim.

A. Post Offices Have A Long History Of Being Public Fora For Communication

The United States presents the astonishing argument that post offices are not in fact public fora. History indisputably illustrates the contrary.

Throughout American history, the post office facility has been an implement of democracy. D.C. ROPER, THE UNITED STATES POST OFFICE: ITS PAST RECORD, PRESENT CONDITION AND POTENTIAL RELATION TO THE NEW WORLD, Preface xv (1917) (hereinafter cited as "ROPER"). It has enlarged the common life and promoted peace and goodwill among people, neighborhoods, communities, states and nations—by spreading knowledge and information. *Id.* at Preface xiii. Initially, the post office provided this country with the means to disseminate the information needed to make self government possible.

Congress became convinced that the circulation of newspapers was "among the surest means of preventing the degeneracy of a free government" and admitted newspapers in 1792 to the mails at "incredibly low" rates. W.E. FULLER, THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE, at 109-111 (1972). The circulation of legislative reports under the Congressional franking privilege and the arrival of out-of-town newspapers made many post offices the colonial equivalent of a modern day newsroom. Uninhibited by considerations of intellectual property law, newspaper publishers used each other's editorial material liberally. And when the out-of-town newspapers were late, editors filled their columns with whatever news was at hand, publishing news from personal letters and even, in one Kentucky newspaper, the

terms of George Washington's will. FULLER, at 112-113.

> The great distances, which sharpened the appetite for news, made the post office in each town a gathering place for men of affairs. Since all letters passed first through the postmaster's hands, he had the quickest and most confidential access to news. When townspeople came to get their mail, he could gather news items of local interest and at the same time sell books, magazines, cough medicine, sealing wax, chocolate, lemons, writing paper, pens and fiddle strings.

D.J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 337 (1958). The post office, one historian observed, "gave birth to the first newspaper." H.M. KONWISER, COLONIAL AND REVOLUTIONARY POSTS: A HISTORY OF THE AMERICAN POSTAL SYSTEM 22 (1931).

Beyond this function as postal and publishing center, the local post office has always been a center for the gathering of people. "Waiting for the mail 'to be put up' is almost a social function in many small communities." ROPER, at 106. This social and communal aspect of the post office dates back to colonial days, where inns and coffee houses were recognized as places to which letters might be brought. In 1639, Massachusetts Bay appointed a Boston tavern as such a place. R.A. MCREYNOLDS, "HISTORY OF THE UNITED STATES POST OFFICE 1607-1931," 8-9 (May 1935) (Dissertation for Ph.D. submitted to University of Chicago) (available in U.S. Post Office Library). Although the post office facility itself has been transformed and modernized, its role has remained unchanged to many Americans in all types of communities.

A 1954 National Geographic article, entitled "Everyone's Servant, the Post Office," includes photographs of post office-general stores in Elmira and Chloe, West Virginia, and of "customers" sitting around and reading the mail, primarily newspapers and periodicals. A.C. Fisher, Jr., *"Everyone's Servant, the Post Office,"* NATIONAL GEOGRAPHIC 132-33 (July 1954). Examples of recent articles in local newspapers call the post office "the town meeting place," Newark *Star-Ledger*, July 23, 1989, at 1, col. 1, and "the center of the community," which is the "main source of social contact." The Birmingham *News*, July 9, 1989, at 1, col. 2.

While beer and ale are no longer served at post offices, non-postal services are provided. Postal patrons can now get a money order, apply for a passport, register for the selective service, scrutinize FBI "wanted" posters, and many patrons can send facsimiles. *See* Postal News Press Release, Nov. 7, 1989. Experiments are underway permitting banks to install the ever-present automatic teller machine inside postal lobbies. *See* Postal News Press Release, Nov. 22, 1989. Indeed, Congress has authorized and supported numerous non-postal commercial services. *See* 39 U.S.C. § 404(a)(6). In doing so, it is of course attempting to increase the number of customers, simultaneously increasing the audience in any postal locale for those who wish to find a place that is guaranteed to be a stop for many types of people.

Those newer post offices in growing suburban settings are less likely to be visited by pedestrians and are more often visited by people arriving in cars. These are the post offices likely to be surrounded by

a Postal Service parking lot, situated on grounds traversed by ingress-egress sidewalks, to lead up to the post office door. The Bowie Post Office is such a post office. *United States v. Kokinda*, JFM-87-083, unreported Memorandum and Order, (D.C. Md. 1987).

Bowie is equidistant from three important urban centers and is a suburban or "bedroom" community. In growing suburbs like this one, there are few real centers of any town or village.[1] Many small privately owned shopping centers, often catering to one builder's group of homes, are likely to be the public's gathering places. Under these circumstances, the post office is one of the few truly central places where people from all surrounding communities are likely to go.

Given the two centuries of history and tradition as open, public places, it was much too late in the day for the Postal Service to attempt, eleven years ago, by regulatory fiat to declare itself a non-public use (see U.S. Br. at 14) or to assert that it had never affirmatively declared Post Office property to be a public forum. U.S. Br. at 20-22.

B. There Is No Sound Legal Basis For Discarding The Public Forum Status Of Post Office Grounds

The concept of the freedom to reach audiences in public places has permeated many more cases than the 47 Supreme Court cases mentioning the phrase

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[1] "[S]uburban sprawl has denied those villages both focus and identity. And many urban planners find the most disturbing aspect to be the decentralization of institutions—municipal buildings, schools, churches and even retailing—that traditionally form the physical and social bases of communities." Neiman, "Getting centered; Suburbs harken to traditional downtowns in search for community heart and soul", CRAIN'S CHICAGO BUSINESS, November 6, 1989, at 17.

"public forum." Quite often without employing the phrase, this Court has embraced the concept. But in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court held that mail from the non-contract teachers' union could be excluded from teachers' mailboxes inside a school building. Restrictions on speech rights were to be examined according to whether the property was (1) a traditional public forum, in which case only content-neutral time, place and manner restrictions narrowly tailored to serve a significant governmental interest were permissible; (2) public property voluntarily opened by the government for public assembly and discussion, which, while open, remained subject to the same time, place and manner regulation as the first category; or (3) public property that is neither by tradition nor declaration a forum for public communication, where the government may forbid speech to further the purposes of the facility so long as the restriction is reasonable and not designed to suppress a particular speaker's point of view. *Id.* at 45-47. This third category has been applied to places where security is or could be of utmost concern, as at a jail, *Adderly v. Florida*, 385 U.S. 39 (1966) or, sometimes, at a military base; *Greer v. Spock*, 424 U.S. 828 (1976); *United States v. Albertini*, 472 U.S. 675 (1985); *cf. Flower v. United States*, 407 U.S. 197 (1972).

Many cases have identified what factors determine a public forum, and whether particular speech can be restricted or banned from the place. Government ownership of the property is one consideration (*Martin v. Struthers*, 319 U.S. 141, 146 (1943)), but is not determinative. *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Marsh v. Alabama*, 326 U.S. 501 (1946); *United States*

Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 130 n.6 (1981). The physical nature of the property is a consideration, and when the place is a sidewalk, so also is the nature of the uses nearby. *United States v. Grace*, 461 U.S. 171, 182 (1983); *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503 (1969); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972). The history of the public's use of the place and the public's current understanding of the appropriate use of the place are factors to consider. *Brown v. Louisiana*, 383 U.S. 131 (1966); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

> Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.

Heffron v. ISKCON, 452 U.S. 640, 650-51 (1981). The crucial question, summarizing all of these considerations taken together, is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. at 116 (1972).

Because there are, and should be, a number of factors to weigh, the Court should be leery of the government's effort to lull it into the ritualistic application of a talismanic formula. *Perry's* tripartite distinction does not negate the other factors just mentioned and is most useful when applied to the task of determining the category of a forum not already well-established.

A quick review of this Court's treatment of publicly owned facilities found not to be public fora reveals

no functional, historical, or physical comparison between these non-public fora and post office grounds. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1988) (a specifically created, narrowly directed charitable donation drive); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (lampposts and utility poles); *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) (letter boxes of private homes); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 135 (1977) (prison access for a prisoners' union); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space inside the cars of a municipally owned commuter line). "Here we have no open spaces, no meeting hall, park, street corner or other public thoroughfare." *Id.* at 303. The long history of the use of postal facilities as a center for all varieties of communicative activity bears no similarity at all to these confined, narrowly directed decisions.

Only one of this Court's decisions deals with an out-of-doors publicly used parcel of ground. In *Greer v. Spock*, 424 U.S. 828 (1976), a military reservation was held to be a non-public forum. There is no similarity, however, between Fort Dix and a post office. Visitors to Fort Dix were greeted by signs warning them of the need for military security, *id.* at 831; the purpose of the fort was to provide basic training for recruits, *id.* at 839; the commander felt that the recruits had no time for political meetings and that it would interfere with "our training and other military missions" *id.* at 833; and finally, a military commander always retains the power to exclude civilians. *Id.* at 838. Similarly the facts in *Adderly v. Florida*, 385 U.S. 39 (1966), relating to jail grounds along the

non-public sheriff's entrance, used to transport prisoners, do not have any comparison to sidewalks leading to the public's entrance to a post office.

One despairs at the thought of postmasters being sent the message that their service facility is comparable to a fort or to a jail. The post office grounds and grounds around many other governmental buildings, state, municipal and federal, are designed to attract and facilitate dealing with the public. To compare these places with school mailboxes, letterboxes at private homes, commuter trains, internal office campaigns, jails and even military bases is to twist the use of *Perry* into an unintended caricature of itself.

Decisions regarding restrictions applicable to sidewalks reveal that this Court has been especially reluctant to permit any "zones" on sidewalks and, when it does, restrictions therein are narrow and direct. In *United States v. Grace*, 461 U.S. 171 (1983), Justice White wrote, "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. The sidewalks around the Court, he wrote, provide " . . . no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 180. Similarly, the public is unlikely to perceive any functional or physical difference be-

tween the public forum sidewalk in front of the post office and the sidewalk leading to the post office door. *See Frisby v. Schultz*, ___ U.S. ___, 108 S. Ct. 2495 (1988) (upholds ordinance forbidding sidewalk pickets aimed at the disruption of an individual's quiet enjoyment of his home, but permits sidewalk picketing in residential neighborhoods); *Boos v. Barry*, ___ U.S. ___, 108 S. Ct. 1157 (1988) (regulation banning signs critical of foreign governments within 500 feet of foreign embassies overturned); *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (demonstrations on sidewalks adjacent to a school banned when disruptive of classroom teaching); *Cox v. Louisiana*, 379 U.S. 559 (1965) (a regulation may prohibit picketing that is so close to a court house that it may disrupt or influence judicial proceedings, but pickets permitted across the street); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (convictions for demonstration on sidewalks surrounding state capitol building overturned).

The government argues in this case (U.S. Br. at 40) as it has before (*United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. at 132-33 (1981)), that the designs of postal facilities are so diverse it is impossible to write rules that are applicable to all post offices. It cannot simultaneously argue that all sidewalks owned by the Postal Service are easily distinguished from municipal sidewalks. Nor can it set up a special category of post offices that are non-public fora, while the area surrounding post offices fronting on municipal sidewalks remain in the public forum category. First Amendment protections cannot turn on structural or architectural distinctions. Such distinctions would allow any public agency, regardless

of its function, to build or to legislate moats to separate itself or sections of town from any First Amendment activity. Such a position has never been approved by this Court. *See United States v. Kokinda*, 866 F.2d at 703.

In *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981), this Court said that the Postal Service had the power to stop the use of mail boxes for the delivery of non-stamped mail, but remarked in closing that Congress, "no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums . . . " *Id.* at 133. The same rule should apply to the United States Postal Service.

Although a few federal circuit courts have upheld the Postal Service regulation at issue here, they have misapplied the *Perry* test in order to deal with truly disruptive conduct that can instead be properly regulated regardless of the nature of the forum. *See infra* Argument II, pages 18-19. None of the opinions reflect any awareness or consideration of the historical traditions of post office as places of congregation and communication. Two cases declined to decide the nature of the post office entrance sidewalks. *Jacobson v. United States Postal Serv.*, 812 F.2d 1151 (9th Cir. 1987) (nonetheless ordering entry of a preliminary injunction against removal of newsracks from post office perimeter sidewalks); *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717 (7th Cir. 1984) (a 2-1 opinion; nonetheless upholding ban on solicitation of contributions as an "inherently more assertive and aggressive" form of conduct). *Id.* 727

In *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), a divided panel upheld the Postal Regulations where the solicitors' tables had been placed in postal entrances and interfered with the efficient provision of postal services. *Id.* at 650. However, the majority opinion in *Bjerke* offers scant support to the government's position:

> In summary, defendants may publicly express their views while on postal property, they may distribute political literature, and engage patrons in any lawful dialogue. In fact, they may even solicit financial contributions immediately outside postal premises, *and perhaps even on certain portions of postal property*. They are simply required not to engage in solicitation at a place where such activities would obstruct necessary and non-political post office operations.

Id., 796 F.2d at 652-3 (emphasis added). Without evidence, explanation, or citation of authority, the court in *United States v. Belsky*, 799 F.2d 1485, 1487 (11th Cir. 1986), decreed that sidewalks on post office grounds were non-public fora. In *Monterey County Democratic Central Committee v. United States Postal Service*, 812 F.2d 1194, 1197 (9th Cir. 1987), the Ninth Circuit found that the mere setback of the post office was enough to make the place comparable to the military fort in *Greer v. Spock*.

In short, neither the historical use of post offices nor reason supports reversing the Fourth Circuit Court of Appeals decision below.

II. THE POSTAL SERVICE HAS THE POWER TO REGULATE GENUINELY DISRUPTIVE CONDUCT IN A PUBLIC FORUM

The fact that Post Office grounds have traditionally been public fora in which a wide variety of speech can and should be tolerated does not require the Postal Service to forego all regulation of its property. Nor does it mandate that everyone trying to use a post office must always run a gauntlet of aggressive and intrusive solicitors and hawkers. The U.S. Postal Service may achieve its legitimate and significant interest in providing uninterrupted access for its patrons by a regulation limiting or forbidding First Amendment activity that creates an involuntary pause or detour in the postal patron's walk to the post office door. While administrative efficiency may be a legitimate consideration, the First Amendment does not permit entire categories of speech to be banned just to eliminate tasks that are routinely required of public employees. Restrictions on expression at post offices, as at any public fora, should be subject to a heightened analysis, permitting content-neutral, reasonable time, place or manner limitations that are narrowly tailored to serve a significant government interest. *Perry*, 460 U.S. at 45. Even *Hague v. CIO*, one of the most often cited authorities for the freedom to speak and assemble in public ways, recognizes some limits:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and con-

> venience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-516.

For example, this Court upheld a rule of The Minnesota Agricultural Society requiring all distributors of any material at the State Fair to do so from a fixed location set in advance by a permit from the Society. *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981). The Court regarded the fixed location rule as a valid limitation in light of the great crowds likely to attend the Fair and the great number of First Amendment distributors likely to want the freedom to wander through the crowds as the Krishnas wished to do. *Id.*

Similarly, there are numerous appeals court cases concerning the regulation of information distribution at another public forum, the airport. *E.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1289 (1988); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). For the most part, these cases are concerned with airport management's attempts to ban the speech in question. Because airport passenger terminals are open to an almost unlimited public, prohibitory regulations have been overturned. Nonetheless, each court acknowledges that the airport management has the power to tailor "restraints designed to further legitimate governmental interests in preserving the forum for the normal pattern of activities conducted there. . . ." *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981).

One of the best and most recent examples of the government's ability to accommodate all legitimate interests of citizens using a public forum was discussed by this Court last term in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989). This litigation began with the City of New York's attempts to accommodate several groups in and nearby Central Park, yet another classic public forum. The compromise devised by the City and upheld by this Court accommodated the noise concerns of nearby residents outside Central Park, quiet users within Central Park, as well as the audiences of many different kinds of musical groups using the Naumberg Acoustic Bandshell. By investing in the right kind of sound equipment and providing a technician trained and instructed to accommodate the needs of the performers, the City enabled the concerts to be performed in a fashion that avoided the evils of uncontrolled volume and inexpertly mixed rock music. Indeed, in footnote 7, the majority points out that this effort to seek out and eliminate specific evils, "without at the same time banning or restricting a substantial quantity of speech that does not create the same evils . . . is the essence of narrow tailoring." *Id.*, 109 S. Ct. 2758. The footnote goes on to explain that a ban on handbilling, by way of analogy, "would be substantially broader than necessary to achieve the interests justifying it." *Id.* Thus, *Ward* recognizes that moderate or even a substantial creative effort can be required from a government agency in order to accommodate protected speech interests of people seeking access to the audience only a public forum can provide.

The comparison to post office grounds is unmistakable. The post office is a facility open to the public, dedicated to the purposes of communication, historically and continuously serving as a way to contact almost everybody in particular locales.

The government admits that other less disruptive forms of expression such as leafletting and picketing may be permitted, (U.S. Br. at 15) but has applied and may continue to apply this contention against the distribution of newspapers on postal grounds. *Cf. e.g., Jacobson v. United States Postal Serv.*, 812 F.2d 1151 (9th Cir. 1987). Offering written materials for sale certainly can be done in a fashion that does not disrupt the postal patron; regulations can forbid the attempt to stop patrons involuntarily. *Id.* at 41. Competing demands for permission can be dealt with first come, first served. *Id.* at 41. Selection of organizations is neither required by postal efficiency nor permitted by the Constitution. *Id.* at 41. Monitoring compliance to regulations can be done by responding to postal patrons' complaints. *Id.* at 41. Space limitations can be dealt with by making the space closest to post office doors off-limits. *Id.* at 41. *See also, United States v. Kokinda*, 866 F.2d at 705. Finally, to the degree that postal patrons or officials are irritated by the organization or its message, the Constitution does not permit such irritation to silence all speech. *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503, 509 (1969).

Rather than using the blunderbuss of an outright ban on all solicitation and a variety of other types of speech, a narrow tailoring of the regulation can set place and behavior limitations that eliminate or control the government's legitimate concerns, while permitting the public to be contacted at their post offices in every appropriate way.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to affirm the majority decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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